

United States District Court
Eastern District of California

Marcelino Calderon Silva,

Plaintiff,

vs.

Rosanne Campbell, et al.,

Defendants.

No. Civ. S 01-0024 LKK PAN P

Findings and Recommendations

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Plaintiff claims defendant Acuna retaliated against him for pursuing grievances and lawsuits by affirming a July 13, 2000, order to place plaintiff in administrative segregation on drug charges and that Campbell retaliated against him by retaining him in administrative segregation on fabricated drug charges. Defendants move to dismiss upon the ground plaintiff failed to exhaust available administrative remedies.

On a motion to dismiss for failure to exhaust administrative remedies, the court may look beyond the pleadings and decide

1 disputed facts. Wyatt v. Terhune, 315 F.3d 1108 (9th Cir. 2002).
2 Pursuant to 42 U.S.C. § 1997e(a), a prisoner may bring no section
3 1983 action until he has exhausted such administrative
4 remedies as are available. The requirement is mandatory. Booth
5 v. Churner, 532 U.S. 731, 741 (2001). The administrative remedy
6 must be exhausted before suit is brought and a prisoner is not
7 entitled to a stay of judicial proceedings in order to exhaust.
8 McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). Where a
9 litigant requests leave to proceed in forma pauperis, suit
10 commences when the request is granted. See 28 U.S.C.
11 § 1915(a)(1) (court may "authorize commencement" of suit without
12 prepayment of filing fee for person demonstrating inability to
13 pay).

14 California prisoners may appeal "any departmental decision,
15 action, condition, or policy which they can demonstrate as having
16 an adverse effect upon their welfare." 15 Cal. Admin. Code
17 § 3084.1(a). The regulations require the use of specific forms
18 upon which the prisoner must "describe the problem and action
19 requested," but require no specific content. 15 Cal. Admin. Code
20 §§ 3084.2, 3085 (designating use of CDC Form 602 Inmate/Parolee
21 Appeal Form for all grievances except those related to
22 disabilities under the Americans with Disabilities Act, which are
23 filed on CDC Form 1824, Reasonable Modification or Accommodation
24 Request). Prisoners ordinarily must present their allegations on
25 one informal and three formal levels of review. 15 Cal. Admin.
26 Code § 3084.5. While presentation on the third level, the

1 Director's Level of Review, exhausts the remedy for departmental
2 purposes, 15 Cal. Admin. Code § 3084.1(a), when prisoners cannot
3 present their allegations on any subsequent level, they have
4 exhausted available remedies for purposes of 42 U.S.C.
5 § 1997e(a). Ngo v. Woodford, 2005 WL 674707 (9th Cir. (Cal.)).
6 Defendant has the burden of identifying the remedies that remain
7 available. Ibid. The Ninth Circuit has explained that a
8 California prisoner who correctly completes an appeal form
9 provided by prison officials provides information adequate to
10 exhaust the administrative remedy for claims arising under the
11 Americans with Disabilities Act. Butler v. Adams, 397 F.3d 1181
12 (9th Cir. 2005) (error to dismiss complaint for failure to
13 identify defendants in administrative form because the form
14 provided by the prison did not require such identification).

15 Defendants contend plaintiff filed no grievances complaining
16 defendants retaliated against him by holding him in
17 administrative segregation.

18 October 5, 2000, plaintiff filed a grievance alleging that
19 July 13, 2000, Vickery arbitrarily placed him in administrative
20 segregation and prison officials held him there on a charge of
21 drug possession with no evidence. He asserted, "The underlying
22 Appeal falls within the First Amendment to the U.S. Constitution
23 to seek the government for redress of grievances; therefore, 'no
24 reprisal shall be taken [sic] for filing an appeal.'" Plaintiff
25 requested the evidence be analyzed for fingerprints so he could
26 present evidence of his innocence at the disciplinary hearing and

1 requested access to grievances and lawsuits filed against a
2 prison guard.

3 December 24, 2000, the appeal was denied on the first formal
4 level upon the ground it was institutional and departmental
5 policy not to conduct fingerprint analysis for disciplinary
6 procedures. Plaintiff was informed that if the District Attorney
7 decided to prosecute, plaintiff would have an attorney and the
8 opportunity to examine the evidence.

9 January 3, 2001, plaintiff appealed to the second level of
10 review, asserting he wanted to prove his innocence through
11 documentary evidence.

12 January 25, 2001, defendant Campbell denied the appeal upon
13 the ground plaintiff's July 13, 2000, placement in administrative
14 segregation was justified by the results of field tests showing
15 the substance found in his cell was heroin or another opiate and
16 assured plaintiff the Institution Classification Committee was
17 monitoring his case. She informed plaintiff that for security
18 reasons he must remain in administrative segregation until the
19 disciplinary proceedings concluded. She denied plaintiff's
20 request for fingerprint analysis.

21 February 8, 2001, plaintiff appealed to the Director's Level
22 of Review alleging that retaining him in administrative
23 segregation was motivated by a desire to retaliate against him
24 for filing grievances and lawsuits and the only way he could
25 prove this was through fingerprint analysis.

26 November 6, 2001, the appeal was denied on the Director's

1 Level of Review upon the grounds plaintiff failed to support his
2 appeal with sufficient evidence, it was not CDC policy to obtain
3 fingerprint analysis for prison disciplinary proceedings and
4 plaintiff had no right to review personnel files.

5 On the form provided by prison officials, plaintiff
6 described the problem and action requested at each level of
7 review. Defendants have not identified any remedy that remains
8 available to plaintiff.

9 Plaintiff has exhausted available administrative remedies.

10 Plaintiff's appeal was denied on the Director's Level of
11 Review January 25, 2001, and this court granted plaintiff leave
12 to proceed in forma pauperis February 28, 2001. Accordingly,
13 plaintiff exhausted available remedies before commencing suit.

14 For these reasons, defendants' September 17, 2004, motion to
15 dismiss should be denied and defendants should be directed to
16 answer the complaint within 30 days.

17 Pursuant to the provisions of 28 U.S.C. § 636(b)(1), these
18 findings and recommendations are submitted to the United States
19 District Judge assigned to this case. Objections may be filed
20 within 20 days of the date these findings and recommendations are
21 served. The document should be captioned "Objections to
22 Magistrate Judge's Findings and Recommendations." The district
23 judge may accept, reject, or modify these findings and
24 recommendations in whole or in part.

25 Dated: June 2, 2005.
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/s/ Peter A. Nowinski
PETER A. NOWINSKI
Magistrate Judge